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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARIA MAGANA,

Plaintiff and Respondent,

v.

CHARLIE'S FOODS, INC., et al,

Defendants and Appellants.

G039684

(Super. Ct. No. 05CC13298)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed in part; reversed and remanded in part.

Allen Matkins Leck Gamble Mallory & Natsis, Jason A. Weiss, Charlene J. Wilson; Edward L. Smilow for Defendants and Appellants.

Rastegar & Matern, Matthew J. Matern, Rania S. Habib, Paul J. Weiner; The Blanco Law Firm, Alejandro D. Blanco; and Norman Pine for Plaintiff and Respondent.

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I. INTRODUCTION

Maria Magana experienced sexual harassment in the course of her work as a driver of a leased catering truck for Charlie's Foods from her supervisor, Jorge Puelma. After her "route" was terminated, she filed this action against Puelma and Charlie's. The ensuing trial resulted in a judgment against Puelma and Charlie's Foods for compensatory damages of \$111,800,¹ plus punitive damages of \$250,000 against Puelma and \$500,000 against Charlie's.

Charlie's and Puelma appealed from the judgment. However, during the pendency of the appeal, Puelma filed a request for dismissal of his appeal with prejudice (as to his appeal only), which we now grant. Puelma's appeal is hereby dismissed with prejudice. We therefore consider only matters raised by Charlie's.

Most of Charlie's challenges to the judgment are unavailing, notably the theory that Magana was really a "customer" of Charlie's and thus not within the purview of the protection of the anti-sexual harassment provisions of the Fair Employment and Housing Act (FEHA) in the first place. In substance, as we explain below, Magana's activities were so tightly controlled by Charlie's that she was an employee. We will therefore affirm the compensatory damage judgment against Charlie's.

There is, however, a problem with the punitive damage judgment against Charlie's. The evidence which Magana put on concerning Charlie's net worth -- literally, nothing more than some checking account records showing large amounts of money going into and out of Charlie's business checking account -- was insufficient to establish Charlie's net worth. (*Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152; *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 56-57; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064.) Ironically, the only substantial evidence of Charlie's net worth was brought out by Charlie's own counsel, but that evidence -- showing net worth of \$600,000 -- is patently disproportionate to the jury's punitive

¹ Consisting of \$1,800 in economic loss, and another \$110,000 in pain and suffering.

damage award against Charlie's of \$500,000. Eighty-three percent of Charlie's net worth is plainly beyond the bounds allowable by our state's punitive damages law.

We have given some considerable thought, as adumbrated at oral argument,² to the issue of whether, given the problem concerning Charlie's net worth, to remand this case for a limited retrial, or simply modify the punitive damage award ourselves. A retrial would necessarily entail some wasteful duplication of effort and we are mindful of Justice Johnson's observation in *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 747, that a limited retrial for purposes of properly fixing punitive damages when evidence of net worth had been omitted the first time is highly inefficient: "It would be the rare plaintiff who would consent to a stipulation the defendant acted fraudulently, with malice or oppression and forego the opportunity to have the jury hear the precise factual details of the defendant's reprehensible conduct. The practical effect of a plaintiff wanting to reestablish entitlement to punitive damages will be lengthy retrials, possibly consuming as many court days as it took to try the matter originally."

Under the particular circumstances of this case, however, a limited retrial is warranted. It is for a trier of fact in the first instance to fix the punitive damages against Charlie's.

In the limited retrial, the trial court is to operate under these guidelines:

- (1) The amount of compensatory damages has now been established: \$111,800 (\$1,800 in economic damages and \$110,000 in emotional distress damages).
- (2) Because Magana had the burden of proof as to Charlie's net worth, the \$600,000 net worth figure is also fixed for retrial.
- (3) The trier of fact on retrial will simply reassess the appropriate amount of punitive damages to be assessed against Charlie's in light of Charlie's established net worth of \$600,000.

² Justice Bedsworth asked Magana's counsel whether, if the evidence of net worth could not support the punitive damage award, she would prefer the matter to be remanded for a limited retrial or whether this court should simply reduce the award. Magana's counsel said he preferred the matter be remanded for a limited retrial.

II. FACTS

A. Magana's Relationship with Charlie's

Maria Magana went to work as a mobile catering truck operator for Charlie's in the fall of 2004. Charlie's provides secured, electricity-ready parking lots for both independently owned catering truck operators, and also those to whom it leases trucks and routes. In addition, Charlie's maintains a food commissary from which independently-owned truck operators, using the lot, have the option to purchase their supplies. Charlie's owns roughly 13 trucks which it leases to operators via a written lease agreement purporting to make an independent business operator of the lessee operator. After an initial inquiry, Magana was offered a truck and its accompanying route by one Jorge Puelma.

Puelma, along with Jack Sarkissian, served as one of Charlie's only two supervisors. Puelma and Sarkissian were described as the "head and heart" of the firm and there is no dispute that the two "ran the company" when Charlie Akoboff (the Charlie in Charlie's Foods) took a leave of absence, which coincided with Magana's time of employment.

Lessee operators are obligated to sign a written lease agreement and all independent drivers are required to have a seller's permit. Magana signed such an agreement.

However, the parts of the written agreement that would normally be the subject of negotiation between the company and a bona fide independent lessee route operator, namely the per diem rental rate for the truck, the amount of insurance required, and the cash bond to be posted by the lessee driver, were all left conspicuously blank. Additionally, Magana was never required to get a seller's permit.

Charlie's (predominantly through Puelma) controlled all policies and decisions regarding Magana's route. Magana was not allowed to either exclude or add stops to the route or take the truck for personal use. In servicing the route, Magana was obliged to purchase all of her supplies except two (Mexican bread and donuts) from Charlie's food commissary.

Charlie's determined when Magana was to start and end her route, dictated where and when she was to make her stops and the prices for which the food was to be sold. Magana was further instructed (per a list of names provided by Charlie's) to give certain customers credit and allow them to pay their bills on a weekly basis. Once Magana returned to Charlie's lot, all sales proceeds of the route were turned over to Charlie's, unlike other drivers, who did not report their sales. Magana instead received a guaranteed daily sum of \$90 when she began working for Charlie's.

B. Sexual Harassment by Supervisor Puelma

Magana testified that, shortly after starting her route, she began to feel sexually harassed by Puelma. This harassment took the form of inappropriate personal questions, which escalated to innuendos that Puelma could and would like to start a sexual relationship with Magana, and, ultimately, two occasions when Puelma came up from behind and grabbed Magana's breasts. Afraid of losing her job, Magana chose to speak to one of her customers (and a close friend of Puelma's) Jose Gonzalez about Puelma's conduct.

Gonzalez reported this conversation to Puelma, making him aware of Magana's discomfort. Acting on advice from Gonzalez, Magana then attempted to speak to Sarkissian about Puelma also, but he brushed her off. Although Sarkissian was the only other supervisor to whom Magana could report Puelma without going directly to Akoboff, and would have been the supervisor charged with investigating any complaints anyone connected with Charlie's may have against Puelma, he walked away, saying merely that he already knew about Puelma's tendencies. Following the lack of attention her complaint registered with Sarkissian, Magana again spoke to Gonzalez about a month later. Magana was fired within the space of two weeks.

C. Testimony Regarding

Harassment of Others

At trial, Akoboff testified that Charlie's did not tolerate sexual harassment of its employees. He and Puelma also testified they personally did not ever engage in sexual harassment.

Magana presented several witnesses who had worked for Charlie's and had a somewhat different view.

In particular, a woman named Maria testified Puelma had encouraged her to use sex as a method of garnering business, and had heard Puelma encourage other female workers to "dress sexy" for the same purpose. More specifically, when Akoboff expressed an interest in taking Maria to Las Vegas with him, Puelma encouraged her to go, telling her, "In order to get something, you have to give something out," which Maria was meant to understand with a sexual undertone. Despite Maria's disinclination to go to Las Vegas, while in Akoboff's office, she was asked to remove her clothing, whereupon Akoboff touched her breasts, commenting, "Oh, these are real."

Three other women testified to other instances of harassment, including Puelma ogling women and using offensive language in conjunction with sexually loaded statements such as "What a rack, what boobs, such big boobs."

III. DISCUSSION

A. The Status of Magana

Charlie's relies primarily on the lease agreement to argue that Magana was an independent business operator and a "customer" rather than an employee.

No. First, those items in the lease agreement that might indeed indicate a legal relationship between independent contractor and "customer," like the lease amount and the insurance, were conspicuously blank.

Given the all-encompassing nature of Charlie's control over Magana's route, her food, her sales, her truck and her cooks, any reasonable jury could easily surmise that the omissions in the lease were nothing but intentional, and the lease was a sham.

But even if the lease agreement had not been a sham (despite leaving key terms blank), the facts established at trial concerning the degree of commercial control Charlie's exercised over Magana readily support the finding that she was an employee.³ Charlie's made all the relevant decisions regarding Magana's route, from what she sold to where she sold it, when she sold it, and at what price. Magana was bound to purchase from Charlie's food commissary and turned over all profits to Charlie's at the end of the day. Even the cooks working on Magana's leased truck had to be paid an amount which Charlie's set. Such a smothering degree of control could not be more divergent from the independence that the independent drivers -- true customers -- enjoyed. Those drivers chose where and what to purchase and set their own prices, and, most significantly, the proceeds of sale at the end of the day remained in their hands, as would be expected of an independent business owner.

Besides relying on the lease itself, Charlie's also makes an argument based on the ostensible flow of money. Relying on an excerpt from footnote 56 in *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 393, it asserts that the "flow of money," ostensibly from Magana to Charlie's, requires the conclusion that she is a customer, not an employee.

The theory fails for two reasons. First, the *Alch* footnote does not say that simple monetary hydraulics is dispositive of employee status. Here is the entirety of *Alch* footnote 56: "Another way of illustrating the difference between employment discrimination claims not covered by the Act and claims that are covered by the Act is to follow the flow of money. In an employer-employee or any comparable relationship, the

³ Ironically, the high level of control over Magana by Charlie's is the strongest reason *not* to classify her as a true "independent contractor" under the sexual harassment statute. Government Code section 12940, subdivision (j)(5) defines independent contractor for purposes of the harassment law as: "'a person providing services pursuant to a contract' means a person who meets all of the following criteria: [¶] (A) The person has the right to control the performance of the contract for services and discretion as to the manner of performance. [¶] (B) The person is customarily engaged in an independently established business. [¶] (C) The person has control over the time and place the work is performed, supplies the tools and instruments used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work."

The interesting aspect of this definition is that in every particular -- right to control, independently established business, control over time and ownership of the tools -- it shows Magana to be closer to being an employee than a true independent contractor.

money flows from the employer or comparable entity to the employee or independent contractor. In the relationship between a business establishment and its ‘clients, patrons or customers,’ the money flows in the opposite direction, from the client to the business establishment. The latter is the case here. The writers pay the talent agencies, not the reverse.” (Italics added.)

That is, in context, *Alch* merely stands for the common sense proposition that a *genuine* flow of money *may* indeed reveal who is an employee and who is not. The flow of money here, though, was Magana’s \$90 remittance from the money she -- like any employee of a shopkeeper -- had to turn in at the end of the day. Unlike the other drivers who actually *kept* the profits of their daily sales and paid Charlie’s whatever fees they owed for food or use of Charlie’s lot, Magana purchased all her food from Charlie’s on credit and then returned each day’s takings to Charlie’s.

There is also the linguistic fit between Magana’s situation and the regulatory definition of an employee. Under title 2 of the California Code of Regulations, section 7286.5 (b), an employee is: “Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.” Given the degree of control Charlie’s exercised over Magana and the performance of her job after she signed the written lease agreement for the truck and route she operated, it is clear that Magana was such an individual. Magana’s principle responsibilities consisted of performing the duties as they were laid out to her for the route she operated, nothing more.⁴

B. Admissibility of Evidence of Prior Sexual Harassment of Others

Magana called both Akoboff and Puelma as hostile witnesses in her case in chief. Each was asked, with no objection, a question that elicited whether he had ever

⁴ See footnote 3 above. There’s a saying in tax law, “if it’s too good to be true, it ain’t true.” Charlie’s attempted to craft an arrangement that, ironically, gave Magana *less* control over her work than an independent contractor would have, and yet have her still not be an employee. That’s the equivalent of tax law’s “it’s too good to be true.”

sexually harassed anyone at Charlie's. Each answered no.⁵ However, there was an Evidence Code section 352 objection as to whether Akoboff might have witnessed or engaged in sexual harassment. After the trial court overruled the objection, Akoboff was asked about allegations that a former driver named Maria had been asked to take her shirt and bra off in front of him. Later, the witness Maria, as well as women named Sofia, Lourdes and Anna, testified to various "offensive" remarks by Puelma or Akoboff. To be sure, the defense presented even more witnesses to the effect that neither man ever made sexually inappropriate remarks or acted inappropriately, but the jury obviously believed the rebuttal witnesses presented by Magana. On appeal Charlie's now claims that the testimony of the rebuttal witnesses was *so* unduly prejudicial that it was an abuse of discretion to admit it under Evidence Code section 352.

Let's confront the core of Charlie's argument. Essentially, the company asserts it was unfair to pillory it for unrelated (that is, unrelated to Magana's case) acts of sexual harassment because Akoboff and Puelma were "forced" to take the stand to head off an inevitable attack focusing on the company's internal policies concerning sexual harassment. (Cf. *Regents of University of California v. Superior Court* (1995) 33 Cal.App.4th 1710, 1714, fn. 1 [hostile workplace claim could not be substantiated by other than direct victim of harassment].)

No. The flaw in the logic here is that Akoboff and Puelma *had* to testify that they had not condoned sexual harassment in the past. That is, it was a dilemma of their own making. The case might have been different if Akoboff and Puelma had testified they *had* engaged in sexual harassment in the past, just not in regard to, say, Magana. That is, *they* made the tactical decision to hope that the jury believed them when they disavowed any past instances of harassment; the ensuing impeachment was simply the rough with the smooth.

⁵ Puelma was asked by Magana's trial counsel: "Q. Did you -- you would not tolerate sexual harassing behavior if it's done around you, true? A. That's correct."

Akoboff was asked by Magana's trial counsel: "What I'm getting at is, do you have a policy -- well, is your sexual harassment policy a zero tolerance policy? A. They know the kind of person I am. They know I wouldn't tolerate it."

In the present case, the impeachment testimony was clearly relevant to rebut Akoboff's and Puelma's denials of sexual harassment. As the trial court said, evidence of credibility is "paramount" in "he said she said" cases. Also, the testimony went directly to whether the company had a real anti-sexual harassment policy. Under such circumstances, the trial judge did not act *unreasonably* in allowing a number of witnesses to rebut Akoboff's and Puelma's attestations of a sexual harassment-free workplace.

There is a fallback argument that the trial court erred in not giving limiting instructions in regard to the rebuttal witnesses. But that argument was effectively waived at trial because the single instruction submitted on the defendants' behalf only referred, in a euphemism of almost Victorian proportions, to "certain evidence," without ever clarifying what precisely that "certain evidence" was. Given the open-ended vagueness of the proposed limiting instruction, it was properly rejected. (See *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 ["Irrelevant, confusing, incomplete or misleading instructions need not be given."].)

C. Substantial Evidence Issue

Charlie's maintains that the jury's verdict finding Charlie's liable for hostile work environment, failure to prevent harassment and retaliation is not supported by substantial evidence. The basic focus is on the retaliation claim; Charlie's makes no attempt to argue that Puelma's grabbing of Magana's breasts and other comments taken as a whole, did not constitute sexual harassment.

Retaliation, however, was readily established by this:

(a) Magana's testimony that she confided in Jose Gonzalez about Puelma's sexual misconduct combined with Gonzalez' testimony that he tried to tell the other supervisor, Jack Sarkissian, about Puelma, but Sarkissian walked away, acknowledging that he already knew about Puelma's untoward tendencies; combined with

(b) testimony of several witnesses that after the complaint, Magana's route was changed to be less lucrative, and Puelma would show up at stops on her route and tell customers that certain food was free.

In short, retaliation followed complaint with transparent speed.

The idea that Charlie's had a legitimate business reason for terminating Magana's employment, namely that the route was losing money, was simply a factual issue to be argued to the jury.

D. The Punitive Damage Issues

1. *Passion-Prejudice?*

Charlie's maintains that the punitive damages award against it was the product of passion or prejudice based on statements made by Magana's counsel during closing arguments that suggested Charlie's was a hotbed of sexual harassment. (To wit: "Sexual harassment is not only tolerated, it's encouraged, it's nurtured, it's incited by the owner," "sexual harassment is company policy at Charlie's Foods" and there was "rampant sexual harassment" at Charlie's.)

The issue is waived because counsel did not object to these statements at trial.

2. *General Principles Governing*

Punitive Damages

Before threading through the punitive damages issues in this case, it is useful to review two basic sets of distinctions that govern our review.

First, federal constitutional law puts limits on punitive damages, typically as they are assessed *in relation to compensatory* damages. (See generally *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061 [case was remanded from United States Supreme Court with instructions to reduce punitive damages to a constitutional level]; e.g., *Johnson v. Ford Motor Co.* (2005) 135 Cal.App.4th 137, 150 [noting original award was too high in relation to the compensatory damages].) The federal limit is the familiar restraint on "multipliers" of compensatory damages. (See generally *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 ["Single-digit multipliers are more likely to comport with due process"].)

However, *state* statutory law, as construed by our state Supreme Court, imposes its own requirement that the plaintiff carry the burden of presenting sufficient evidence of the defendant's "financial condition." (See generally *Adams v. Murakami* (1991) 54 Cal.3d 105.) The idea is that the "function of punitive damages is not served by an award which, in light of defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Id.* at p. 110, quoting *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) One should note that in *Adams* our high court expressly declined to say that the requirement of evidence of a defendant's financial condition is constitutionally imposed. Rather, the court said it is simply a matter of state law. (See *id.* at p. 118 ["We need not decide, and do not decide, whether evidence of a defendant's financial condition is a *constitutional* prerequisite"].)

3. *Applied to Charlie's*

Magana's evidence of Charlie's financial condition was skimpy, to say the least. She called only one witness, Anna Poladian, who was Charlie's operations manager. Most of Poladian's testimony consisted of establishing that Charlie's owns a number of trucks, ranging in value from \$15,000 to \$45,000, but did not establish Charlie's equity in them. (See *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 681 ["There is no evidence regarding whether or to what extent the house is mortgaged or otherwise encumbered, or to what extent, if any, the rental income generates net profit."].) Magana's counsel also tried to get Poladian to admit that Charlie's has goodwill as an ongoing business, but in vain.

The main import of Poladian's testimony was to authenticate a series of exhibits, which literally consist of nothing more than a voluminous series of checking account entries. Magana offered no testimony from a forensic accountant or expert to give any meaningful income figure. Poladian *did* testify that Charlie's made a profit of \$480,000 in 2005, but sustained a loss of about \$204,000 in 2006.

Magana argues that this evidence was sufficient because it managed to establish a *discrepancy* between Charlie's reported income on its tax returns, particularly in 2005, because the banking statements reflected monthly deposits of about \$750,000 to

\$1 million (about \$11 million in *deposits*), even though Charlie's reported gross receipts or sales of just over \$7 million. Therefore, says Magana, the jury could reasonably infer that Charlie's is skimming \$4 million (or at least skimmed \$4 million in 2005) in "pure profit."

The argument fails for this reason. Cash flow cannot be automatically equated with gross receipts or sales. Not everything that goes into a checking account is necessarily gross receipts or sales. Everyone knows that if you are reimbursed with a check for the lunch you put on your credit card the amount of the check does not have to be reported on your tax return. Also, when an owner of a company puts money into a checking account to keep a business running (say, to make payroll or pay vendors), that money doesn't count as gross receipts or sales either. Under *Adams*, Magana had the burden of proof of showing Charlie's financial condition, so it was her burden to present evidence that would allow the trier of fact to conclude that *all* the money that went into the checking account was gross receipts or sales. Absent that crucial link, the evidence was meaningless.

Moreover, even if Charlie's were not reporting what it should to the IRS, the fact remains that simple cash flow absent evidence of liabilities is not sufficient to establish net worth. (*Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 681 ["In sum, although the record shows that Peterson owns substantial assets, it is silent with respect to her liabilities. The record is thus insufficient for a reviewing court to evaluate Peterson's ability to pay \$75,000 in punitive damages."]; *Kenly v. Ukegawa*, *supra*, 16 Cal.App.4th at pp. 56-57 [evidence of the profits wrongfully gained by the defendant is inadequate as it gives only the assets without the liabilities]; *Lara v. Cadag*, *supra*, 13 Cal.App.4th at p. 1063 ["We do not have a clue about his assets or liabilities . . ."].)

If all we had in this record was the evidence that Magana proffered as to Charlie's financial condition, we would have to reverse and there would be no possibility of punitive damages on retrial, which is what happened in *Baxter*. (See *Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 679 [subheading entitled: *The Punitive Damages Award Is Not Supported by Substantial Evidence and May Not Be Retried*].)

But sometimes litigants get a break. After Magana finished examining Poladian, Charlie's counsel asked her a few questions, one of which established that Charlie's had a net worth of approximately \$600,000. Of course, given what *Adams* said about the state law purpose of punitive damages being to punish and deter, not destroy, there is no way the existing award against Charlie's -- 83 percent of its net worth -- can be sustained in this appeal.⁶

Which brings up the final problem we face: To remand, or not to remand, for reconsideration of punitive damages according to the \$600,000 net worth figure.

There is precedent for this court simply to reduce the award on our own, effectively modifying the judgment at the appellate level based on its non-conformity with state law. (E.g., *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1256 ["When required by justice, a reviewing court should modify a punitive damage award to ensure that the public policies behind its making are served."].)

But there is also precedent contemplating retrial. (See *Kenly v. Ukegawa*, *supra*, 16 Cal.App.4th at pp. 58-59 [while reversing one party of all punitive damages, sending case back for retrial as to compensatory and punitive damages of two other parties].) In this case, we see no reason the trier of fact should not assess the appropriate punitive damages in the first instance. (See *Adams*, *supra*, 54 Cal.3d at p. 127 (dis. opn. of Mosk, J.) ["punitive damages issues must be decided in the first instance by the jury"].)

⁶ We are not concerned in this sexual harassment case with the relatively exotic question of whether punitive damages may be assessed against the ill-gotten profits of a fraud. (Cf. *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291, 1294 [basing punitive damages on the total profit in the fraudulent transaction].)

IV. DISPOSITIONS

The judgment is affirmed insofar as it provides that plaintiff Maria Magana shall recover \$118,000 against Charlie's Foods.

The judgment is reversed insofar as it provides that plaintiff Magana shall recover \$500,000 in punitive damages against Charlie's Foods, and the case is remanded for the trier of fact to fix appropriate punitive damages in light of the established fact that Charlie's Foods net worth is \$600,000.

Retrial shall be in conformity with the views expressed in this opinion. In the interest of justice, each party will bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.